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No. 79-822

In the Supreme Court of the United States

OCTOBER TERM, 1979

PAUL SCOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that the trial court erred in allowing the prosecutor to state in rebuttal argument that a potential witness had been available to both sides. He also claims that he was entitled to a mistrial because a juror overheard a government witness admit that he had lied in testifying that a co-defendant was not at the scene of the crime.

Following a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted of possession of goods stolen from interstate

commerce in violation of 18 U.S.C. 659. He was sentenced to imprisonment for one year and one day. The court of appeals affirmed (Pet. App. 5a-8a).[1]

The evidence at trial established that during a two-day period in January 1978, a group of six men stole 121 cases of whiskey from a snow bound freight train in Cincinnati, Ohio (Tr. 45-46, 106).[2] Petitioner arranged to buy 77 cases of the liquor and instructed that they be delivered to co-defendant Harralson's used-car lot (Tr. 128, 131, 136-141). After delivery, petitioner paid the men approximately $1800 in cash for the liquor (Tr. 142-144).

1. Petitioner contends (Br. 7-8) that the trial court improperly allowed the prosecutor to comment, in effect, on his failure to call a particular witness. This claim is without merit.

Everett Adams was one of the six men convicted of the liquor theft. In his closing, petitioner's counsel argued that the government had failed to produce "the mysterious Everett Adams" (Tr. 322). On rebuttal, the prosecutor commented that "bringing witnesses into court * * * is a two-way street. Every party that comes into court has the power to bring in any witness that they want, to subpoena any witness" (Tr. 335).[3] Shortly

[1]The judgment of the court of appeals was entered on October 24, 1979, and the petition for a writ of certiorari was not filed until November 26, 1979. The petition is therefore out of time under Rule 22(2) of the Rules of this Court.

[2]All of the men were convicted for the theft. Three of them, Rickie Teater, Bill Johnson and Carl Jackson, testified for the government at petitioner's trial.

[3]At a pre-charge conference held in chambers, petitioner's counsel informed the court that he planned to comment on the government's failure to call Adams (Tr. 280, 300). The government then requested permission to argue that Adams, who had been incarcerated locally,

thereafter, the court instructed the jury that the defendants had no duty or burden of calling any witnesses or of producing any evidence (Tr. 343, 345).

It is well settled that a prosecutor may comment on the failure of the defense to substantiate its factual claims, provided that the comment cannot be construed as a reference to the defendant's failure to testify. *United States* v. *Bubar*, 567 F. 2d 192 (2d Cir.), cert. denied, 434 U.S. 872 (1977); *United States* v. *Keller*, 512 F. 2d 182 (3d Cir. 1975); *United States* v. *Hager*, 505 F. 2d 737 (8th Cir. 1974). In this case, the reference was clearly not to the defendants' failure to testify but related solely to the possibility of Adams' appearance, which defense counsel first raised as an issue. As the trial court observed, Adams was equally available to both sides. The prosecutor's remarks were neither inflammatory nor prejudicial and constituted a fair response to defense counsel's unsupported implication that the government was withholding evidence because it did not call Adams. See *United States* v. *Ivey*, 550 F. 2d 243, 244 (5th Cir. 1977); *United States* v. *Stofsky*, 527 F. 2d 237, 249 (2d Cir. 1975), cert. denied, 429 U.S. 819 (1976).[4] Moreover, in light of the court's admonition moments later that the defense was not required to call any witnesses and that the government

was equally available to both sides (Tr. 279, 300-302). The court held that the witness was not "within either sides' peculiar power to produce" and that the government would be entitled to respond to the proposed defense argument (Tr. 305-306).

[4]This case is therefore unlike *United States* v. *Blakemore*, 489 F. 2d 193 (6th Cir. 1973), cited by petitioner (Pet. 7-8), in which the prosecutor's argument was not in response to defense argument, the trial court failed to inquire into the availability of the uncalled witnesses, and the prosecutor argued that an "adverse inference" is permitted from the defendant's failure to call witnesses he had subpoenaed for trial.

alone bore the burden of proof, any conceivable prejudice from the prosecutor's response was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18 (1967).

2. Petitioner also claims (Pet. 8-9) that the trial court erred in failing to declare a mistrial after a juror overheard an out-of-court comment made by a government witness. However, the "highest degree of respect" must be accorded a trial court's decision in matters of this kind (*Arizona* v. *Washington*, 434 U.S. 497, 511 (1978); see also *Geders* v. *United States*, 425 U.S. 80, 86-87 (1976)), and the record in this case reveals that the court acted well within its discretion in denying petitioner's motion.

Carl Jackson testified for the government at trial (Tr. 86-122). He repeatedly asserted that although there had been someone other than the six co-defendants at Harralson's car lot when the whiskey was unloaded, he did not know who that individual was (Tr. 100, 115-117). During a morning recess following Jackson's testimony, one of the jurors overheard Jackson talking to friends in the coffee shop. Contrary to his testimony in court, Jackson then stated that Harralson, another defendant, had been standing right next to him when he unloaded the whiskey (Nov. 17, 1978 Tr. 4).[5] The next day, during the course of jury deliberations, the juror, Mr. Huber, sent a message to the court as follows: "If a juror overheard a witness outside of court admit he told a lie on the witness stand, does this interest you or should it even be considered in our deliberations?" (Tr. 363). Upon learning

[5]Jackson was reported to have said, "Hell, Fletcher was right next to me when I unloaded the whiskey." "Fletcher" was an alias used by Harralson.

of the question, counsel for petitioner moved for a mistrial (Tr. 364). The court postponed ruling on petitioner's motion and responded to the juror's question by instructing that the credibility of a witness is for the jury to decide (Tr. 364-365). Counsel for petitioner stated that he had no objection to such a charge (Tr. 365-366). Later, the court convened in chambers with counsel and questioned juror Huber about the statement he had overheard (Nov. 17, 1978 Tr. 2-14). The court then denied petitioner's motion for a mistrial, finding that petitioner had not been prejudiced by the out-of-court comment (Pet. App. 1a-4a).

On this record, the court was manifestly correct in concluding that it was not required to abort the trial. The hearing with Huber established that he had no private conversation with Jackson but had simply chanced to overhear Jackson's out-of-court statement.[6] Although petitioner argues (Pet. 8) that the impact of the out-of-court statement "is only subject to speculation," no conceivable impact that this statement might have had on Huber would have prejudiced petitioner. The statement exclusively concerned Harralson's involvement and accordingly could not have contributed to the substantive case against petitioner, whether or not it was believed—a point petitioner does not dispute. To the extent the comment might had affected Huber's assessment of the case in general, the impact surely would have been adverse to the government—and concomitantly favorable to petitioner—by casting into doubt the veracity of a government witness. Finally, petitioner's participation in the offense had been clearly established by the other

[6]This case is therefore altogether unlike *Turner* v. *Louisiana*, 379 U.S. 466 (1965). In *Turner*, the jurors had continuous contact and numerous conversations over a three-day period with two deputy sheriffs who were witnesses for the government.

witnesses at trial; Jackson's testimony was simply not pertinent to the issues affecting petitioner's guilt or innocence.[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[7]For this reason, there is nothing in petitioner's suggestion (Pet. 8-9) that his conviction rested in part on perjured testimony. Not only did the testimony not involve petitioner, it was perjurious evidently only to the extent it exculpated Harralson. Moreover, there is no evidence that the government was aware at the time of trial that Jackson's testimony, about Harralson or any other subject, was untrue.

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